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John V. Orth

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THE PAST IS NEVER DEAD: MAGNA CARTA IN NORTH CAROLINA*

JOHN V. ORTH

The past is never dead. It's not even past.

—WILLIAM FAULKNER, *REQUIEM FOR A NUN*¹

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INTRODUCTION

It is characteristic of the Anglo-American legal tradition that it locates the Golden Age not in the future but in the past. In 1100, King Henry I promised in his coronation charter to restore the good customs as they were in the days of King Edward the Confessor, before the Norman Conquest.² In 1215 Henry II's son, King John, acting under duress, sealed Magna Carta, restoring ancient liberties.³ Three centuries later, Sir Edward Coke combated the absolutist claims of King James I with appeals to ancient learning found in old books, things whereof the memory of man runneth not to the contrary, and gave particular prominence to the rediscovered—in fact reinvented—Magna Carta.⁴ In the eighteenth century, Americans saw themselves reenacting Coke's challenge to Stuart absolutism as they

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1. WILLIAM FAULKNER, *REQUIEM FOR A NUN* 119 (1951).

2. Coronation Charter of Henry I, *translated in MAGNA CARTA AND THE RULE OF LAW*, 379 app. A (Daniel Barstow Magraw et al. eds., 2014); *see* JUDITH A. GREEN, *THE GOVERNMENT OF ENGLAND UNDER HENRY I*, at 98 (1986).

3. 1 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I*, at 172 (2d ed. 1898) (“On the whole, the charter contains little that is absolutely new. It is restorative.”).

4. *See* MAURICE ASHLEY, *MAGNA CARTA IN THE SEVENTEENTH CENTURY* 10–13 (1965); HERBERT BUTTERFIELD, *THE ENGLISHMAN AND HIS HISTORY* 55 (Ernest Barker ed., 1945).

defied King George III.⁵ After Independence, Thomas Jefferson proposed to base the laws of Virginia on English common law as it was before the “oldest statutes extant,” that is, even before Magna Carta.⁶ But, of course, it was never possible to go back to the “good old days” of Anglo-Saxon England or to the ancient constitution of Sir Edward Coke. Nor did anyone really want to. It was an idealized past, a past that never was that they wanted to revivify or, rather, vivify. A tradition that claims to be ruled by the past cannot rest content with the past as it was. The past must somehow be made to do the work of the present.

The tension between the past *as past* and an imagined past that is used to justify a desired present inevitably creates tensions between historians committed to the Rankean ideal of telling it *wie es eigentlich gewesen*, as it really was,⁷ and the assorted reformers, revolutionaries, and legal theorists who claim to want to turn back the clock. This tension was evident from the beginning. Tories and royalists dismissed Magna Carta as a feudal irrelevance: the seventeenth-century scholar Robert Brady was a better historian than Coke.⁸ But who ever heard of Robert Brady?

It is now a commonplace that there are two Magna Cartas, the medieval “big charter”—big as opposed to the little Carta de Foresta⁹—and the reimagined Great Charter of Liberties of Sir Edward Coke.¹⁰ In fact, there is at least one more: the Magna Carta that Americans gleaned from the pages of Blackstone’s

5. See JAMES R. STONER, JR., COMMON LAW AND LIBERAL THEORY: COKE, HOBBS, AND THE ORIGINS OF AMERICAN CONSTITUTIONALISM 11–47 (1992); David N. Mayer, *The English Radical Whig Origins of American Constitutionalism*, 70 WASH. U. L.Q. 131, 174–96 (1992).

6. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 137 (William Peden ed., 1955) (1785).

7. Leopold von Ranke, *Preface: Histories of the Latin and Germanic Nations from 1494–1514*, in THE VARIETIES OF HISTORY: FROM VOLTAIRE TO THE PRESENT 55, 57 (Fritz Stern ed., 1956).

8. See HERBERT BUTTERFIELD, MAGNA CARTA IN THE HISTORIOGRAPHY OF THE SIXTEENTH AND SEVENTEENTH CENTURIES 23 (1969) (“Brady . . . stands for the principle with which we are so familiar at the present day—namely, that a document like the Charter has to be interpreted according to the form and structure of the society in which it had its origin.”); see also J. C. HOLT, MAGNA CARTA 36 (George Garnett & John Hudson eds., 3d ed. 2015); J. G. A. Pocock, THE ANCIENT CONSTITUTION AND THE FEUDAL LAW: A STUDY OF ENGLISH HISTORICAL THOUGHT IN THE SEVENTEENTH CENTURY 182–228 (1967).

9. See W. L. WARREN, KING JOHN 237 n. (1961).

10. Wm. S. McKechnie, *Magna Carta (1215–1915)*, in MAGNA CARTA COMMEMORATION ESSAYS 1, 12 (Henry Elliott Malden ed., 1917).

Commentaries.¹¹ Even the most ardent defenders of England's chartered liberties recognized that many, even most, of the chapters of Magna Carta were ancient history in the negative sense, irrelevant centuries later. The feudal incident of relief upon inheritance, limited by chapters two and three (1215),¹² went out with the Statute of Tenures (1660).¹³ And the grasping kinsmen of Gerard de Athyes, deprived of their offices by chapter fifty (1215),¹⁴ became food for worms long ago.

I. MAGNA CARTA IN NORTH CAROLINA: THE NINETEENTH CENTURY

But a handful of the chapters from the original could still be put to use in the present—most obviously, the famous *legem terrae* or law of the land clause, chapter thirty-nine of the original, chapter twenty-nine of the 1225 edition and subsequent codification.¹⁵ Determined to consolidate their victory over tyranny, many American revolutionaries promptly incorporated this clause in their state constitutions.¹⁶ In the North Carolina Declaration of Rights of 1776, an edited version modeled on the Maryland Declaration of Rights drafted earlier that year¹⁷ appears in section twelve: “[N]o freeman ought to be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the law of the land.”¹⁸

Carried forward in the state's 1868 constitution¹⁹ and again in the 1971 revision,²⁰ it is now often thought of as North Carolina's version

11. 1 WILLIAM BLACKSTONE, COMMENTARIES *127–28. G. Alan Tarr refers to the three “faces” of Magna Carta: “an historical face, a legal face, and a symbolic face.” G. Alan Tarr, *American State Constitutions and the Three Faces of Magna Carta*, in MAGNA CARTA: MUSE AND MENTOR 122, 122 (Randy J. Holland ed., 2014).

12. MAGNA CARTA chs. 2, 3 (1215), *reprinted and translated in* DAVID CARPENTER, MAGNA CARTA 38–39 (2015).

13. 12 Car. 2, c. 24 (1660).

14. MAGNA CARTA ch. 50 (1215), *reprinted and translated in* CARPENTER, *supra* note 12, at 56–57.

15. MAGNA CARTA ch. 39 (1215), *reprinted and translated in* CARPENTER, *supra* note 12, at 52–53; MAGNA CARTA ch. 29 (1225), *translated in* MAGNA CARTA AND THE RULE OF LAW, *supra* note 2, at 429.

16. *E.g.*, MD. CONST. of 1776, Declaration of Rights, § 21.

17. *Id.*

18. N.C. CONST. of 1776, Declaration of Rights, § 12.

19. N.C. CONST. of 1868, art. I, § 17. The 1868 Constitution carried forward the provision in the 1776 Constitution verbatim, renumbering the section and relabeling the Declaration of Rights as Article I.

20. N.C. CONST. art. I, § 19 (substituting “shall” for “ought”). The mandatory nature of the provisions of the original Declaration of Rights had long been recognized. *See, e.g.*,

of the Federal Due Process Clause,²¹ although in fact it would be more accurate to think of the Federal Due Process Clause²²—also derived from the same chapter of Magna Carta by way of a Law French translation²³—as the federal version of North Carolina’s law of the land clause.

Although the law of the land clause was the only bit of Magna Carta copied more or less directly into the state’s first constitution, the North Carolina drafters undoubtedly thought they had incorporated much more. Habeas corpus and trial by jury were then often fathered on Magna Carta.²⁴ And years later, when knowledge of the 1215 original revealed what had dropped out of the reissues, the source of the ban on taxation without representation was located in

Smith v. Campbell, 10 N.C. (3 Hawks) 590, 598 (1825) (“[T]he word *ought*, in this and other sections of the [Constitution,] should be understood imperatively. It is sufficient for the creature to know the will of the creator. Obedience is then a duty, without an express command.”). For a brief discussion of the insignificance of the changed wording, see John V. Orth, 10 CONST. COMMENT. 203, 205–06 (1993) (reviewing TOWARD A USABLE PAST: LIBERTY UNDER STATE CONSTITUTIONS (Paul Finkelman & Stephen E. Gottlieb eds., 1991)). Also in 1971, an additional sentence guaranteeing equal protection of the laws was added. N.C. CONST. art I, § 19; see JOHN V. ORTH & PAUL MARTIN NEWBY, THE NORTH CAROLINA STATE CONSTITUTION 68 (2d ed. 2013).

21. See, e.g., State v. Parrish, 254 N.C. 301, 303, 118 S.E.2d 786, 788 (1961); Nat’l Sur. Corp. v. Sharpe, 232 N.C. 98, 103, 59 S.E.2d 593, 597 (1950); Yancey v. N.C. State Highway & Pub. Works Comm’n, 222 N.C. 106, 108, 22 S.E.2d 256, 258 (1942); Johnston v. State, 224 N.C. App. 282, 296, 735 S.E.2d 859, 870 (2012), *aff’d per curiam*, 367 N.C. 164, 749 S.E.2d 278 (2013).

22. U.S. CONST. amend. V (“No person shall be . . . deprived of life, liberty, or property, without due process of law . . .”).

23. See 1 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 59–63 (7th ed. 1956).

24. As to habeas corpus, see, for example, *In re Bryan*, 60 N.C. (Win.) 1, 15 (1863) (citing “our Constitution and Bill of Rights, in which is reiterated the great principle of *Magna Carta*, ‘every free man restrained of his liberty is entitled to a remedy to inquire into the lawfulness thereof, and to remove the same if unlawful, and such remedy ought not to be denied or delayed’ ”); Report of the Commissioners Appointed by an Act of the Legislature of 1817, To Revise the Laws of North-Carolina, in 1 LAWS OF THE STATE OF NORTH-CAROLINA, at iii, v (Henry Potter ed., 1821) (“[T]he immunity of the subject from unjust imprisonment is proclaimed by magna charta . . .”). As to trial by jury, see, for example, Resolutions Adopted by the Provincial Congress of North Carolina (Aug. 27, 1774), in 9 THE COLONIAL RECORDS OF NORTH CAROLINA 1043, 1045 (William L. Saunders ed., 1890) (“Resolved, That trial by Juries of the vicinity is the only lawful inquest that can pass upon the life of a British subject and that it is a right handed down to us from the earliest stages confirmed and sanctified by Magna Charta itself that no freeman shall be taken and imprisoned or dispossessed of his free tenement and Liberties or outlawed or banished or otherwise hurt or injured unless by the legal judgment of his peers or by the law of the Land, and therefore all who suffer otherwise are not victims to public justice but fall a sacrifice to the powers of Tyranny and highhanded oppression.”).

the lost chapters twelve and fourteen.²⁵ But the exact ancestry of the rights declared in the state's first constitution was really beside the point. The drafters took Coke at his word that Magna Carta was "for the most part declaratory of the principal grounds of the fundamental laws of England."²⁶ Common law reception, beginning with a colonial statute in 1715 and repeated after Independence with a state statute in 1778, made further copying unnecessary.²⁷

For sixty years after Independence, North Carolina lawyers worried fitfully about whether any of the lesser chapters of Magna Carta were included among the English statutes still in force in the state. Francois-Xavier Martin in his *Collection of the Statutes of the Parliament of England in Force in the State of North-Carolina*, published in 1792 in accordance with "a resolve of the General Assembly," included two such lesser chapters: the chapter concerning the security of foreign merchants and the chapter limiting appeals of death by a woman.²⁸ But Henry Potter's revisal in 1821 did not

25. See JOHN MANNING, COMMENTARIES ON THE FIRST BOOK OF BLACKSTONE 27 (1899) (listing under "Rights of Private Property, Protections Afforded, Magna Charta": "No taxes are to be imposed without the consent of the people or their representatives"); SAMUEL F. MORDECAI, LAW LECTURES: A TREATISE, FROM A NORTH CAROLINA STANDPOINT, ON THOSE PORTIONS OF THE FIRST AND SECOND BOOKS OF THE COMMENTARIES OF SIR WILLIAM BLACKSTONE WHICH HAVE NOT BECOME OBSOLETE IN THE UNITED STATES 33 (1916) ("[Magna Carta] is said to be the forerunner of the control of the purse strings by parliament."). But see A. E. DICK HOWARD, MAGNA CARTA: TEXT AND COMMENTARY 11 (rev. ed. 1998) ("This puts the argument for the significance of chapters 12 and 14 in too strong and too modern a form. Nevertheless, it is not hard to see that in the notion that at least some kinds of exactions could not be had without consent there lay a ready example for those who in later ages sought ancient precedents for the claim of the right of a people to be taxed only with their consent.").

26. 1 BLACKSTONE, *supra* note 11, at *127–28 (citing EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND *proem).

27. Act of 1778, ch. 5, *reprinted in* 24 THE STATE RECORDS OF NORTH CAROLINA 162 (Walter Clark ed., 1905); Act of 1715, ch. 31, *reprinted in* 23 THE STATE RECORDS OF NORTH CAROLINA 38 (Walter Clark ed., 1905). An Act of 1749 had adopted seven chapters from the 1225 codification of Magna Carta, including the all-important chapter twenty-nine. Act of 1749, ch. 1, *reprinted in* 23 THE STATE RECORDS OF NORTH CAROLINA 317 (Walter Clark ed., 1905). Although included in Swann's Revisal, it disappeared from later collections. See A COLLECTION OF ALL THE PUBLIC ACTS OF ASSEMBLY, OF THE PROVINCE OF NORTH-CAROLINA: NOW IN FORCE AND USE 293–94 (Samuel Swann ed., James Davis 1751); JAMES IREDELL, LAWS OF THE STATE OF NORTH-CAROLINA 127 n.a (Edenton, N.C., Hodge & Wills 1791) (noting that the Act of 1749 is "universally acknowledged to have been repealed or disallowed by the King in Council"). It was traditionally believed that it was disallowed "upon the ground that it was too sweeping in its repeal of British statutes." MORDECAI, *supra* note 25, at 6–7.

28. FRANCOIS-XAVIER MARTIN, A COLLECTION OF THE STATUTES OF THE PARLIAMENT OF ENGLAND IN FORCE IN THE STATE OF NORTH-CAROLINA 1 (Newbern, N.C., Editor's Press 1792). Compare MAGNA CARTA chs. 30, 34 (1225), *translated in*

include either of these (or any other) chapters of Magna Carta.²⁹ Only in 1838 was the problem definitively resolved. The Revised Statutes, enacted by the general assembly and published in that year, repealed whatever English statutes were still in force, with certain exceptions.³⁰

When authorizing the preparation of the Revised Statutes, the general assembly directed the superintendents, James Iredell and William Battle, to include certain historical documents as well: “the second charter of Charles the Second to the lords proprietors of this State, the great deed of grant from the lords proprietors, the grant from George the Second to the Earl of Granville”—essentially the title deeds to the state—and “such other acts, now in force, and not repealed by this act, as the superintendents may in their discretion think proper.”³¹ Interpreting their mandate broadly, Iredell and Battle included both the “Magna Carta of King John” and the “Magna Carta of Edward I.”³² And for good measure, they added the Petition of Rights (reaffirming relevant parts of Magna Carta) and other similar documents.³³ The immediate source may have been an identical collection in South Carolina’s revisal of a year earlier,³⁴ in both, King John’s Magna Carta is divided into seventy-nine chapters, rather than the now familiar sixty-three³⁵—incidentally making the citation of Magna Carta, already confused by the multiple reissues, even more complicated.³⁶ The South Carolinians credited Sir William

MAGNA CARTA AND THE RULE OF LAW, *supra* note 2, at 430, with MAGNA CARTA chs. 41, 54 (1215), *reprinted and translated in* CARPENTER, *supra* note 12, at 52–53, 58–59.

29. 1 LAWS OF THE STATE OF NORTH-CAROLINA, *supra* note 24, at 85–93. Although the general assembly charged Henry Potter, J. L. Taylor, and Bart. Yancey with preparing the revisal, Potter was the one who supervised the publication and whose name is attached to the revisal in the official statutory history in the North Carolina General Statutes. *Id.*

30. See 1 N.C. REV. STAT. ch. 26, § 2 (1837).

31. *Id.* § 10. Frederick Nash had been authorized by the general assembly, along with Iredell and Battle, to prepare the revised statutes, but only Iredell and Battle supervised the publication, which is referred to in the official statutory history in the North Carolina General Statutes as Revised Statutes. *Id.*

32. 2 N.C. REV. STAT. 480–500 (1837).

33. *Id.* at 501–09. The copy of the Revised Statutes in the collection of Martin Brinkley, Dean of the University of North Carolina School of Law, is inscribed with marginalia by Thomas Ruffin.

34. 1 THE STATUTES AT LARGE OF SOUTH CAROLINA 72–77 (Thomas Cooper ed., Columbia, S.C., A. S. Johnston 1836).

35. Compare 2 N.C. REV. STAT. 480–92 (1837), and 1 THE STATUTES AT LARGE OF SOUTH CAROLINA, *supra* note 34, at 75–77, with MAGNA CARTA chs. 1–63 (1215), *reprinted and translated in* CARPENTER, *supra* note 12, at 36–69.

36. *E.g.*, Rose v. City of Rocky Mount, 184 N.C. 609, 610, 113 S.E. 506, 507 (1922) (citing “chapter 47” on the prompt administration of justice). In the conventional division of Magna Carta of 1215 this chapter would be numbered forty, but in the 1225 reissue it would be chapter twenty-nine. Compare MAGNA CARTA ch. 40 (1215), *reprinted and*

Blackstone's *Law Tracts* for the Latin text—included in the South Carolina, but not the North Carolina compilation—and the English translation of Magna Carta by Nicolas Tindal and Tobias Smollett in Paul Rapin de Thoyras's *Histoire d'Angleterre*.³⁷

The renewed interest that Carolinians showed in the historical documents may have been more than mere scholarly zeal; it came at a time of growing sectional conflict. Nat Turner's rebellion in Virginia in 1831 had given new urgency to the national debate about slavery.³⁸ The union had barely survived the South Carolina Nullification Crisis the following year.³⁹ And the abolitionist campaign had begun to rattle North Carolinian nerves.⁴⁰ Governor David Swain used his 1835 address to the general assembly to denounce the recent "spirit of fanaticism."⁴¹ Southerners may have looked to Magna Carta's centuries-old guarantee of free men's property to defend slavery—the region's "peculiar institution."⁴² Eventually, Chief Justice Roger Taney would hold in the notorious *Dred Scott* case⁴³ that the federal

translated in CARPENTER, *supra* note 12, at 52–53, with MAGNA CARTA ch. 29 (1225), translated in MAGNA CARTA AND THE RULE OF LAW, *supra* note 2, at 429.

37. 1 THE STATUTES AT LARGE OF SOUTH CAROLINA, *supra* note 34, at 73 ("The Charter of King John, I have taken from Blackstone's Law-tracts, compared with the edition in the *Stat. of the Realm*. The translation I have adopted from Rapin's *Hist. of England*."); see 2 WILLIAM BLACKSTONE, LAW TRACTS 15–37 (Oxford, Clarendon Press 1762); 1 RAPIN DE THOYRAS, HISTORY OF ENGLAND 261 (N. Tindal & T. Smollett eds. & trans., London, John Harrison 1789) (1724) (citing the Cotton Library as the source of the Latin text). The copy of Blackstone's *Law Tracts* in the collection of the Kathrine R. Everett Law Library of the University of North Carolina is inscribed by William Hooper, a signer of the Declaration of Independence, and dated in 1765 in Hooper's handwriting.

38. See generally NAT TURNER 1–12 (Eric Foner ed., 1971) (analyzing contemporary understandings and historical accounts of Nat Turner's slave rebellion).

39. See generally WILLIAM W. FREEHLING, PRELUDE TO CIVIL WAR: THE NULLIFICATION CONTROVERSY IN SOUTH CAROLINA, 1816–1836, at ix–3 (1965) (providing an in-depth chronicle of events and discussion of the crisis of 1832–1833).

40. See LACY K. FORD, DELIVER US FROM EVIL: THE SLAVERY QUESTION IN THE OLD SOUTH 494 (2009).

41. DAVID L. SWAIN, MESSAGE OF THE GOVERNOR OF NORTH CAROLINA, TO THE GENERAL ASSEMBLY OF THE STATE, AT THE COMMENCEMENT OF THE SESSION, NOVEMBER 16, 1835, at 6 (1835); see FORD, *supra* note 40, at 494.

42. KENNETH M. STAMPP, THE PECULIAR INSTITUTION: SLAVERY IN THE ANTEBELLUM SOUTH (Vintage Books ed. 1956). The only other state to include Magna Carta in its statute books during the antebellum period was Georgia in 1845. Northern states followed after the Civil War. For a complete list of states that included Magna Carta in their statute books, see Joyce Lee Malcolm, *Magna Carta in America: Entrenched*, in MAGNA CARTA: THE FOUNDATION OF FREEDOM 1215–2015, at 120, 132 (Nicholas Vincent ed., 2d ed. 2015).

43. *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

guarantee of due process protected a slave owner's property—a precocious example of substantive due process.⁴⁴

After the Civil War, North Carolina caught up with other states and included in the Reconstruction Constitution of 1868 a clause inspired by another chapter of Magna Carta: the open courts clause. This clause, elaborated from chapter forty (1215),⁴⁵ chapter twenty of the 1225 edition⁴⁶ and subsequent codification, provided the following: “All courts shall be open, and every person for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial, or delay.”⁴⁷

From early days, North Carolina judges cited chapters of Magna Carta but not always the obvious ones. In a 1795 case concerning the nice point of whether a bond sealed but not subscribed by the witnesses could be declared upon in an action of debt or whether only covenant lay, Judge Haywood noted that archbishops, bishops, and barons attested Magna Carta by their seals, not by their signatures.⁴⁸ Other unusual cases sometimes reminded learned jurists of obsolete chapters of Magna Carta. For instance, the case of a guardian who permitted his underage female ward to marry the guardian's impecunious son led Justice Gaston to mention the nondisparagement chapter.⁴⁹ A claim of an exclusive right to fish in navigable waters reminded Chief Justice Ruffin of the chapter concerning fish weirs.⁵⁰ A bequest to Davidson College that would have caused the college's assets to exceed the maximum allowed by its charter reminded Chief Justice Nash of the mortmain chapter in the reissue of 1225.⁵¹ And a personal injury action brought by an Austro-Hungarian father on behalf of his minor son, which was caught up in the outbreak of

44. *Id.* at 450 (“[A]n act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law.”).

45. MAGNA CARTA ch. 40 (1215), *reprinted and translated in* CARPENTER, *supra* note 12, at 52–53.

46. MAGNA CARTA ch. 20 (1225), *translated in* MAGNA CARTA AND THE RULE OF LAW, *supra* note 2, at 428.

47. N.C. CONST. of 1868, art. I, § 35; *see* N.C. CONST. art. I, § 18.

48. *Ingram v. Hall*, 2 N.C. (1 Hayw.) 193, 204 (Super. Ct. 1795).

49. *Shutt v. Carloss*, 36 N.C. (1 Ired. Eq.) 232, 240 (1838) (referring to MAGNA CARTA ch. 6 (1215)).

50. *Collins v. Benbury*, 27 N.C. (5 Ired.) 118, 126 (1844) (referring to MAGNA CARTA ch. 33 (1215)).

51. *Trs. of Davidson Coll. v. Ex rel. Chambers*, 56 N.C. (3 Jones Eq.) 253, 278 (1857) (Nash, C.J., dissenting) (citing 9 Hen. 3, c. 36 (1225)).

World War I, recalled “the enlightened and humane provision of Magna Charta, c. 30 [1225]” on the subject of foreign merchants in time of war.⁵² Judicial discussions of dower⁵³ were often ornamented with references to the relevant chapters of Magna Carta, including the right of quarantine, the dowager’s right to occupy the mansion house for forty days after her husband’s decease.⁵⁴

II. WALTER CLARK AND MAGNA CARTA

A flurry of citations to Magna Carta is also associated with the tenure of Walter Clark, who served on the Supreme Court of North Carolina from 1889 to 1924, the last twenty-one years of which he served as Chief Justice.⁵⁵ Clark’s changing attitude toward the charter exemplifies the tension that developed as historicist and legalist approaches to Magna Carta diverged in the early twentieth century.⁵⁶ In a 1905 personal injury action against a railroad, he repeated the traditional view that “[t]he guaranty of the right of trial by jury is traced back with pride to the words of Magna Charta, ‘Legale judicium parium suorum.’”⁵⁷ At this time, Clark was repeating common legal lore in North Carolina.⁵⁸ Judges before Clark routinely described the constitutional right to trial by jury as a “fundamental principle of the common law, declared in ‘Magna Charta.’”⁵⁹ In fact,

52. *Krachanake v. Acme Mfg. Co.*, 175 N.C. 435, 439, 95 S.E. 851, 853 (1918) (referring to MAGNA CARTA ch. 30 (1225)).

53. Dower was available to surviving spouses until 1959. *See* Act of June 10, 1959, ch. 879, § 1, N.C. Sess. Laws 886, 886 (codified at N.C. GEN. STAT. § 29-4 (2015)) (“The estates of curtesy and dower are hereby abolished.”).

54. *E.g.*, *In re Gorham*, 177 N.C. 271, 277, 98 S.E. 717, 720 (1919); *Fishel v. Browning*, 145 N.C. 71, 75, 58 S.E. 759, 760 (1907); *Sutton v. Askew*, 66 N.C. 172, 181–82 (1872); *Griffin v. Simpson*, 33 N.C. (11 Ired.) 126, 127 (1850); *Spencer v. Weston*, 18 N.C. (1 Dev. & Bat.) 213, 214–15 (1835).

55. NORTH CAROLINA GOVERNMENT, 1585–1979: A NARRATIVE AND STATISTICAL HISTORY 575–76 (John L. Cheney, Jr. ed., 1981).

56. *See, e.g.*, Walter Clark, *Some Myths of the Law*, 13 MICH. L. REV. 26, 28–30 (1914) (describing the “myth” of Magna Carta and explaining that it has been incorrectly used and interpreted by some courts); Edward Jenks, *The Myth of Magna Carta*, 4 INDEP. REV. 260, 261–62 (1905) (arguing that “Magna Carta was not (a) the work of the ‘nation’ or the ‘people’ in any reasonable sense of the term, nor (b) a landmark in constitutional progress, but (c) a positive nuisance and stumbling-block to the generation which came after it”).

57. *Kearns v. S. Ry. Co.*, 139 N.C. 470, 482, 52 S.E. 131, 136 (1905) (Clark, C.J., dissenting) (quoting MAGNA CARTA ch. 39 (1215)).

58. *See* Resolutions Adopted by the Provincial Congress of North Carolina (Aug. 27, 1774), *supra* note 24, at 1045.

59. *State v. Stewart*, 89 N.C. 563, 564 (1883); *see also* *State v. Holt*, 90 N.C. 749, 751 (1884) (“The people of the American Union, and especially the people of this state, have, ever since their existence as a people, regarded and treated this provision in their organic law as an essential feature in free government and as one of the fundamental bulwarks of their civil and political liberty.”).

the independence of the jury in North Carolina was guaranteed to an extent that would have struck English judges as extreme. Trial judges could make no comment concerning the probable guilt of the defendant or the credibility of witnesses.⁶⁰ As Justice Bynum stated in an 1876 opinion, “The jury must not only unanimously concur in the verdict, but must be left free to act according to the dictates of their own judgment.”⁶¹ So sacrosanct was the jury’s freedom of action that it was reversible error for a trial judge to say that two opposing witnesses were both “gentlemen.”⁶² The jury had to be free to decide without comment that one (or both) was not.⁶³

After 1905, Clark’s attitude toward Magna Carta and jury trial underwent a dramatic reversal. William Sharp McKechnie’s *Commentary on the Great Charter of King John* appeared that year,⁶⁴ and Clark was an early and avid reader.⁶⁵ By the 1906 term of court, Clark revealed his new attitude: “[W]e know,” he said, “that the words ‘judicium parium suorum’ in Magna Charta, c. 39 [1215], did not either create or guaranty the right of trial by jury (as at one time was erroneously thought)” —including, although he did not mention it, by Walter Clark.⁶⁶ For authority, he cited “McKechnie, Magna Charta, 452.”⁶⁷ Later, in the 1913 case of *State v. Rodgers*,⁶⁸ Clark penned the most complete statement of his new understanding of the great charter: “There have been law writers and judges who have

60. Act of 1796, ch. 452, § 1, reprinted in 1 N.C. REV. STAT. ch. 1, § 136 (1837) (codified as amended in N.C. GEN. STAT. § 15A-1232 (2015)), prohibited judges from commenting on evidence, but it had been held to be merely an “affirmance of the Constitution, Art. I secs. 13–17, and the well-settled principles of the common law as set forth in *Magna Charta*.” *State v. Dixon*, 75 N.C. 275, 276 (1876). As Justice Douglas later observed, the construction placed on the statute “goes beyond the words of the act, but it is accepted as a proper one.” *State v. Howard*, 129 N.C. 584, 674–75, 40 S.E. 71, 80 (1901) (Douglas, J., dissenting) (quoting *State v. Jones*, 67 N.C. 285, 287 (1872)).

61. *Dixon*, 75 N.C. at 276.

62. *MacRae v. Lawrence*, 75 N.C. 289, 289–91 (1876).

63. *Id.*

64. WILLIAM SHARP MCKECHNIE, *MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN* (1905). McKechnie’s book reached North Carolina lawyers quickly. The copy in the collection of the Kathrine R. Everett Law Library of the University of North Carolina is inscribed by L. P. McGehee and dated June 1905. At the time McGehee was a newly hired law professor. He later served as dean of the University of North Carolina School of Law (1910–1923). *History*, UNC SCH. L., <http://www.law.unc.edu/about/history/> [https://perma.cc/Y3P6-CAK4].

65. See *Daniels v. Homer*, 139 N.C. 219, 238, 51 S.E. 992, 999 (1905) (Clark, C.J.) (citing William Sharp McKechnie as “[t]he latest commentator on Magna Charta”).

66. *Williams v. Atl. Coast Line R. Co.*, 140 N.C. 623, 626, 53 S.E. 448, 450 (1906), overruled in part by *Currie & McQueen v. Seaboard Air Line Ry.*, 156 N.C. 419, 425–26, 72 S.E. 488, 490 (1911).

67. *Id.*

68. 162 N.C. 656, 78 S.E. 293 (1913).

stated that Magna Carta, c. 39[, no longer Magna *Charta* in his parlance,] guaranteed the right of trial by jury; but this view originated at a time when historical statements were received with less investigation than at present.”⁶⁹ “The words therein ‘judicium suorum parium,’ ” Clark now insisted, “had no reference to a trial by jury,” again citing McKechnie (and adding Pollock and Maitland’s *The History of English Law* for good measure).⁷⁰ According to Clark, the barons were not, in fact, demanding a general benefit but a “special privilege” for themselves: “[W]hen the King had any charge against one of their order he should not send his judges against them, but the charge must be tried by men of their own order, i.e., by barons.”⁷¹ Magna Carta and other similar charters now interested Clark only as “historical documents of a stage far below ours in the development of human rights.”⁷² The following year in the *Michigan Law Review*, he listed then common understandings of Magna Carta among the “myths of the law.”⁷³

With characteristic feistiness, Clark—called by his biographer the “fighting judge”⁷⁴—continued to propagate the truth about “that much misunderstood instrument, the Magna Carta of John.”⁷⁵ No longer idealized as the product of heroic barons, “sword in hand,” defending English liberty against a tyrannical ruler,⁷⁶ it now appeared to Clark as merely a sordid deal between “brutal barons” and a “contemptible king.”⁷⁷ “[T]rial by jury was not provided for in Magna Carta,” he flatly declared; in fact, he insisted, “at that time there were neither juries nor lawyers in England.”⁷⁸ Of course, the discontinuity Clark perceived affected only the historian, not the jurist. He remained as committed as ever to the right to trial by jury in North Carolina, still understood as an independent panel of twelve acting only by unanimity, but he no longer proudly traced the right back to

69. *Id.* at 662, 78 S.E. at 295 (Clark, C.J., dissenting).

70. *Id.* (citing MCKECHNIE, *supra* note 64, at 158, 456, 457; 1 POLLOCK & MAITLAND, *supra* note 3, at 392, 581).

71. *Id.* at 663, 78 S.E. at 295.

72. *Id.* at 663, 78 S.E. at 296.

73. Clark, *supra* note 56, at 28.

74. See AUBREY LEE BROOKS, WALTER CLARK, FIGHTING JUDGE 81–84 (1944).

75. *Jordan v. Simmons*, 175 N.C. 537, 540, 95 S.E. 919, 920 (1918) (Clark, C.J., concurring).

76. See 1 BLACKSTONE, *supra* note 11, at *127; THE FEDERALIST NO. 84, at 534 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1966).

77. *Jordan*, 175 N.C. at 540, 95 S.E. at 920.

78. *In re Stone*, 176 N.C. 336, 348, 97 S.E. 216, 222 (1918).

the thirteenth century. Magna Carta, he observed, was not law in North Carolina anyway.⁷⁹

Clark's judicial utterances on the subject punctuated his chief justiceship, culminating in an *American Law Review* article he published in 1924, the year of his death.⁸⁰ "The object of this article," he wrote with the zeal of a convert,

is in the interest of truth to show that broad as are the provisions of *Magna Carta* and great as has been its effect upon the course of history, it has no claim however to be styled, as it often has been, the origin and guarantee of trial by jury with which it had nothing whatever to do.⁸¹

For leading lawyers astray, Clark blamed Coke and Blackstone, particularly the latter.⁸² The greater part of the *Commentaries*, he said, was "obsolete learning," with "[m]uch of it [] incorrect at the time it was written."⁸³ Regarding the persistence of the fallacy concerning the jury, Clark attributed it to "a not unnatural tendency of a later generation of lawyers to explain what was unfamiliar in the great Charter by the surroundings of their own day."⁸⁴

But Clark's campaign in the interest of truth did not succeed. Once his commanding presence was removed from the court, the justices quickly began to repair the rupture created by his revisionist history. Clark's bier had barely been removed from the capitol when in 1925 Justice Clarkson, newly appointed to the court, quoted from an 1883 opinion that predated Clark's tenure: "It is a fundamental principle of the common law, declared in 'Magna Charta,' [the *h* has returned to the title,] and again in our Bill of Rights, that 'no person shall be convicted of any crime but by the unanimous verdict of a jury

79. See *State v. Rogers*, 162 N.C. 656, 663, 78 S.E. 293, 296 (1913) (Clark, C.J., dissenting) ("Magna Carta and other similar contracts between [the king and the barons] . . . confer no rights upon us, still less do they restrict our right to self-government. We base our right to [trial by jury], not upon the grant of any King, but upon the inherent power to govern ourselves . . .").

80. Walter Clark, *Magna Carta and Trial by Jury*, 58 AM. L. REV. 24 (1924).

81. *Id.* at 24.

82. For Clark's unfavorable review of the influence of Coke and Blackstone, see Walter Clark, *Coke, Blackstone, and the Common Law*, 24 LAW. MAG. 5, 15 (1918). Clark's complaint that "the influence of Blackstone and Coke has had a very narrowing effect upon our Profession" elicited a spirited response from Samuel Fox Mordecai, Dean of Trinity (now Duke) Law School. S.F. MORDECAI, MORDECAI'S MISCELLANIES 3 (1927).

83. Clark, *supra* note 80, at 37 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *60).

84. *Id.* at 31.

of good and lawful men in open court.’ ”⁸⁵ In 1937 Clarkson joined issue with Clark (and McKechnie) on the Latin key words:

In Magna Charta the basic principle of [the right to trial by jury] is more than once insisted on, as the great bulwark of English liberties, but especially by the provision that “no freeman shall be hurt, in either his person or property (*nisi per legale iudicium parium suorum vel per legem terrae*), unless by lawful judgment of his peers or equals, or by the law of the land”⁸⁶

By 1944, Justice Seawell would assert, despite Walter Clark’s best efforts, that “most writers” regard “Magna Charta” as “guaranteeing trial by jury.”⁸⁷ And in 1971, Justice Sharp wrote that the right to a trial by jury was a “fundamental principle of the common law, declared in Magna Charta and incorporated in our Declaration of Rights.”⁸⁸ This view has persisted into the twenty-first century. In 2007 Justice Brady repeated that “[s]o fundamental to the jurisprudence of the Anglosphere is the right to a trial by jury that it is set forth in the Magna Carta”⁸⁹

III. MAGNA CARTA IN NORTH CAROLINA TODAY

Whatever the precise relationship between *legem terrae* and trial by jury, the guarantee of the law of the land has been more fertile for state constitutional law than any other clause. Before the progressive incorporation of the Federal Bill of Rights into the Due Process Clause of the Fourteenth Amendment,⁹⁰ the law of the land was the

85. *State v. Berry*, 190 N.C. 363, 363, 130 S.E. 12, 12 (1925) (Clarkson, J.) (quoting *State v. Stewart*, 89 N.C. 563, 564 (1883)). A few years later, Clarkson quoted Justice Joseph Story:

In Magna Carta the basic principle of [the right to trial by jury] is more than once insisted on, as the great bulwark of English liberties, but especially by the provision that “no freeman shall be hurt, in either his person or property, unless by lawful judgment of his peers or equals, or by the law of the land.”

State v. Lawrence, 196 N.C. 562, 578, 146 S.E. 395, 403 (1929) (Clarkson, J.) (quoting 16 RULING CASE LAW § 3, at 182 (William M. McKinney & Burdett A. Rich eds., 1917)).

86. *Oliver v. City of Raleigh*, 212 N.C. 465, 470, 193 S.E. 853, 856 (1937) (Clarkson, J., dissenting) (quoting 16 RULING CASE LAW, *supra* note 85, § 3, at 182).

87. *State v. Emery*, 224 N.C. 581, 595, 31 S.E.2d 858, 868 (1944) (Seawell, J., dissenting).

88. *State v. Hudson*, 280 N.C. 74, 79, 185 S.E.2d 189, 192 (1971) (Sharp, J.) (citing *State v. Stewart*, 89 N.C. 563, 564 (1883)).

89. *State v. Lasiter*, 361 N.C. 299, 307, 643 S.E.2d 909, 914 (2007) (Brady, J., concurring).

90. *E.g.*, *Gideon v. Wainwright*, 372 U.S. 335, 342–44 (1963) (incorporating the Sixth Amendment Assistance of Counsel Clause through the Fourteenth Amendment Due

focus for judicial thinking about fundamental fairness.⁹¹ Magna Carta gave it a distinguished provenance. Even before the addition of the open courts clause to the Constitution in 1868, the Supreme Court of North Carolina, citing Magna Carta, found the right to a remedy implied in the law of the land.⁹² Despite the fact that the state constitution has no takings clause, the court in 1892 located the protection against uncompensated takings in the law of the land, again citing Magna Carta.⁹³ And the guarantee against double jeopardy, also lacking specific mention in the state constitution, was found in 1907 in “the fundamental principles of the common law” and “Magna Charta.”⁹⁴

After incorporation made most of the Federal Bill of Rights enforceable against the states, the law of the land clause became relatively less important. But, the state supreme court continued to insist on it as an independent basis for decision, a legacy of the once lively project of expansive readings of state constitutions.⁹⁵ In 1971, two years after the United States Supreme Court incorporated the Double Jeopardy Clause of the Fifth Amendment into the Fourteenth Amendment,⁹⁶ the state supreme court insisted that the decision “added nothing to our law,” which already prohibited double jeopardy as a violation of the law of the land.⁹⁷ Today the Supreme Court of North Carolina sometimes actually skips the middle term and simply asserts—most recently in 2014—that there *is* a double jeopardy clause in the state constitution.⁹⁸

Process Clause); *Mapp v. Ohio*, 367 U.S. 643, 661 (1961) (extending the exclusionary rule of the Fourth Amendment to state criminal prosecutions by way of the Fourteenth Amendment Due Process Clause). *See generally* MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986) (discussing the history of the Bill of Rights and its application to the states).

91. *See, e.g.*, *Parish v. E. Coast Cedar Co.*, 133 N.C. 478, 483, 45 S.E. 768, 770 (1903) (“We refer to the federal Constitution only by way of analogy, as we base our decision in the case at bar exclusively upon the provisions of the Constitution of this state.”).

92. *Barnes v. Barnes*, 53 N.C. (8 Jones) 366, 374 (1861) (quoting 1 BLACKSTONE, *supra* note 11, at *141).

93. *Staton v. Norfolk & C. R. Co.*, 111 N.C. 278, 282–85, 16 S.E. 181, 182–83 (1892); *see also Yancey v. N.C. State Highway & Pub. Works Comm’n*, 222 N.C. 106, 108, 22 S.E.2d 256, 258 (1942) (citing MAGNA CARTA ch. 39 (1215)).

94. *State v. Tisdale*, 145 N.C. 422, 426, 58 S.E. 998, 1000 (1907) (Walker, J., concurring).

95. *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 498–503 (1977) (advocating reliance on state constitutional protections).

96. *Benton v. Maryland*, 395 U.S. 784, 794 (1969).

97. *State v. Battle*, 279 N.C. 484, 486, 183 S.E.2d 641, 643 (1971).

98. *E.g.*, *State v. Banks*, 367 N.C. 652, 655, 766 S.E.2d 334, 337 (2014) (quoting *State v. Gardner*, 315 N.C. 444, 452, 342 S.E.2d 701, 707 (1986)) (referring to the “Double

The open courts clause, like the law of the land clause, traces its pedigree to Magna Carta. While the phrase “open courts” is not to be found in the original charter, it accurately captures the sense of chapter forty (1215): “To no one will we sell, to no one will we deny or delay, right or justice”; that is, the courts shall be open to do justice.⁹⁹ As a practical matter, the open courts clause in the state constitution functioned as a guarantee of speedy trial at a time when the federal guarantee in the Sixth Amendment did not extend to the states.¹⁰⁰ In this case, Walter Clark was still proud to trace the guarantee to the words of Magna Carta. While continuing to insist that “modern research has demonstrated that we do not owe trial by jury to Magna Charta, and that it originated years after,” he remained committed to the tie between the historic charter and speedy trial: “One of the pledges of Magna Carta was that ‘justice should not be delayed.’ ”¹⁰¹ In a per curiam opinion that bears the marks of Clark’s style, the court held that

[w]hile Magna Charta did not originate, or require, trial by jury, as at one time thought, it is very certain that it did guarantee that there should be a prompt administration of justice by providing (chapter 47) that the courts will neither sell justice, nor deny it, nor delay it, and a delay of justice is often a denial of justice.¹⁰²

Had Clark read McKechnie’s commentary on chapter forty as closely as he read the commentary on chapter thirty-nine, he might

Jeopardy Clauses of both the United States and North Carolina Constitutions”). *But see* State v. Rambert, 341 N.C. 173, 175 n.1, 459 S.E.2d 510, 512 n.1 (1995) (citing State v. Ballard, 280 N.C. 479, 482, 186 S.E.2d 372, 373 (1972)) (acknowledging that the state constitution does not in fact have a double jeopardy clause but noting that the same protection is implied in the law of the land clause).

99. MAGNA CARTA ch. 40 (1215), *reprinted and translated in* CARPENTER, *supra* note 12, at 52–53; *cf.* N.C. CONST. art. I, § 18 (“All courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay.”); *id.* art. IV, § 9(2) (“The Superior Courts shall be open at all times for the transaction of all business except the trial of issues of fact requiring a jury.”).

100. *E.g.*, Pettitt v. Atl. Coast Line R. Co., 186 N.C. 9, 16–17, 118 S.E. 840, 844–45 (1923) (Clark, C.J.); Slocumb v. Phila. Const. Co., 142 N.C. 349, 352, 55 S.E. 196, 197 (1906) (Clark, C.J.); Johnston v. Whitehead, 109 N.C. 207, 209, 13 S.E. 731, 731 (1891) (Clark, J.).

101. Davis v. S. Ry. Co., 170 N.C. 582, 599, 600, 87 S.E. 745, 753, 754 (1916) (Clark, C.J., dissenting).

102. Rose v. City of Rocky Mount, 184 N.C. 609, 610, 113 S.E. 506, 507 (1922) (per curiam). Chapter forty-seven in “Magna Carta of King John” as cited and reprinted in 2 N.C. REV. STAT. 486 (1837) is chapter forty in the conventional division of MAGNA CARTA (1215).

not have been so certain. “This chapter,” McKechnie wrote, “like the preceding one with which it is so closely connected, has had much read into it by commentators which would have astonished its original framers. The application of modern standards to ancient practice has resulted in a complete misapprehension.”¹⁰³ McKechnie explained the chapter as chiefly concerned with the sale of justice and attributed

the prominence usually given to it in legal treatises . . . to the fact that it has been broadly interpreted as a universal guarantee of impartial justice to high and low; and because when so interpreted it has become in the hands of patriots in many ages a powerful weapon in the cause of constitutional freedom.¹⁰⁴

McKechnie barely mentioned delay of justice, and then only in connection with payments to speed the legal process.

The tendency of lawyers and judges to understand the medieval words of Magna Carta in a modern sense was demonstrated afresh in 1976 when the state supreme court held that the open courts clause guarantees public access to courtroom proceedings.¹⁰⁵ The guarantee of legal remedies for legal wrongs thus became a guarantee of public, as well as speedy, trials. Having once created the right to public trials, the court has, of course, had to qualify it with exceptions.¹⁰⁶

CONCLUSION

Anachronistic readings are perhaps inevitable in a tradition that looks to the past for guidance in the present. Clark may well be right that Coke and Blackstone misled their readers about the real meaning of Magna Carta, but the drafters of the state constitution were convinced and incorporated that meaning into the text. As no less a personage than Henry Kissinger reminded us: “[W]hat ‘really’ happened is often less important than what is thought to have happened.”¹⁰⁷ So firmly settled was state law by 1905 that Clark could

103. MCKECHNIE, *supra* note 64, at 459.

104. *Id.* at 463.

105. *In re Edens*, 290 N.C. 299, 306, 226 S.E.2d 5, 9–10 (1976).

106. *See, e.g.*, *Virmani v. Presbyterian Health Servs. Corp.*, 350 N.C. 449, 474–78, 515 S.E.2d 675, 691–94 (1999) (excluding the public during presentation of evidence regarding medical peer review investigation); *State v. Clark*, 324 N.C. 146, 167, 377 S.E.2d 54, 66–67 (1989) (excluding spectators that would distract the jury); *State v. Burney*, 302 N.C. 529, 533–38, 276 S.E.2d 693, 695–98 (1981) (excluding the public during testimony of a child rape victim).

107. Niall Ferguson, *The Meaning of Kissinger: A Realist Reconsidered*, 94 FOREIGN AFF., Sept.–Oct. 2015, at 134, 137 (quoting HENRY A. KISSINGER, A WORLD RESTORED: METTERNICH, CASTLEREAGH AND THE PROBLEMS OF PEACE 1812–22, at 33 (1957)).

adopt the latest historical thinking without jeopardizing North Carolinians' right to trial by jury. McKechnie was writing history, not law, but he did recognize that revisionist scholarship like his may "undervalue[] the importance of traditional interpretations which, even when based on insecure historical foundations, are shown in the sequel to have proved of supreme value in the battle of freedom."¹⁰⁸

The Great Charter was one of the inspirations for written constitutions, intended to restrain the exercise of power. The great irony is that it empowered judges to use the text as precedent for judicial elaboration. The words—as so often in the common law—were not the end of the process, but only the beginning. A text may mean, or imply, or be made to mean more than it says.¹⁰⁹ Once the process has begun, the tendency is not to start with the words but with the last, or the last few, cases that construed them. One is almost tempted to say that it is not text, but texture that matters most.¹¹⁰ Just as Sir Edward Coke found new meanings in old documents, so modern jurists continue the search. One need only consider the recent same-sex marriage decision to see how far determined jurists can take due process or the law of the land or *legem terrae*.¹¹¹

Revisionism has a way of turning upon itself. Robert Brady had an agenda, the opposite of Coke's.¹¹² And even critics acting only in the interest of truth cannot attain certainty. As Professor J. C. Holt reminded us in his magisterial study of the Great Charter, Coke's history is "not quite so insecure as . . . the modern critics would suggest."¹¹³ It is, he said, "to pursue a will-o'-the-wisp" to assume that "the exact contemporary sense of Magna Carta can be established as a canon whereby Coke and all other 'false' interpreters can be

108. MCKECHNIE, *supra* note 64, at ix (commenting on Jenks, *supra* note 56).

109. An example from federal constitutional law is the judicial elaboration of the Eleventh Amendment. *See generally* JOHN V. ORTH, *THE JUDICIAL POWER OF THE UNITED STATES: THE ELEVENTH AMENDMENT IN AMERICAN HISTORY* (1987).

110. *Cf.* VLADIMIR NABOKOV, *Canto III*, in *PALE FIRE* (1962) ("But all at once it dawned on me that *this* / Was the real point, the contrapuntal theme; / Just this: not text, but texture; not the dream / But topsy-turvical coincidence, / Not flimsy nonsense, but a web of sense."). I am indebted to Joseph L. Hyde, Assistant Attorney General, State of North Carolina, for directing me to these lines.

111. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597–2605 (2015).

112. BUTTERFIELD, *supra* note 8, at 22, 25 (stating that Brady "made a full-scale attack on the view of history which the common lawyers had developed . . . [but] Brady carried his historical revision too far . . .").

113. HOLT, *supra* note 8, at 36.

judged.”¹¹⁴ It is not only the future that year by year recedes before us; it is also the past.

Magna Carta is an historical artifact, and it is not. Or rather, there are two historical artifacts: what it meant in 1215 and its evolving meaning over time. History is the story of both stasis and change. The divergence of the two stories must be recognized, but need not cause alarm. As any property lawyer can testify, there are few titles in our law that are wholly unclouded, and the root of many of them is doubtful—based, you might say, on “insecure historical foundations”—but long continued enjoyment under a claim of right (i.e., adverse possession) clears away most clouds.

114. *Id.*; see also CHARLES HOWARD MCILWAIN, *THE HIGH COURT OF PARLIAMENT AND ITS SUPREMACY: AN HISTORICAL ESSAY ON THE BOUNDARIES BETWEEN LEGISLATION AND ADJUDICATION IN ENGLAND* 16 (1962) (positing that Magna Carta stood for “a subtraction from the royal power” and subsequently “formed the most valuable precedent for the later exercise of national rights”).